UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

CASE NO. 07 Civ. 4113 (LLS)

CHINESE AUTOMOBILE DISTRIBUTORS OF AMERICA, LLC, a limited liability company, individually and, with respect to certain claims, in a derivative capacity,

Plaintiff,

v.

MALCOLM BRICKLIN, an individual; **JONATHAN BRICKLIN**, an individual; **BARBARA BRICKLIN JONAS**, an individual; **MICHAEL JONAS**, an individual; **SANIA TEYMENY**, an individual; **SCOTT GILDEA**, an individual; and **VISIONARY VEHICLES, LLC**, a limited liability company;

Defendants.

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DEFENDANTS MOTION TO DISQUALIFY McCARTER & ENGLISH, LLP

Defendant, Visionary Vehicles, LLC, ("VV"), MALCOLM BRICKLIN, JONATHAN BROCKLIN, BARBARA BRICKLIN JONAS and SNAI TEYMENY, but not SCOTT GILDEA (collectively referred to as "Defendants"), by and through the undersigned counsel, hereby move to disqualify McCarter & English, LLP from representing Plaintiff, CHINESE AUTOMOBILE DISTRIBUTORS OF AMERICA, LLC, ("CADA"). The grounds in support of this motion are as follows:

This Motion is brought to disqualify the law firm of McCarter & English, LLP (the "McCarter Firm") from representing CADA in this action because of a conflict of interest arising under Canons 4, 5 and 9, and corresponding Disciplinary Rules DR 5-108 (A)(1) [22 NYCRR §

1200.27 (A)(1)] and DR 5-105 (D) [22 NYCRR § 1200.24 (D)] of the Code of Professional Responsibility (the "Code"). In the Second Circuit, the American Bar Association Code of Professional Responsibility prescribes the appropriate guidelines for professional conduct of the bar. NCK Org., Ltd. v. Bregman, 542 F.2d 128, 130 n.2 (2d Cir. 1976); also see Local Civil Rule 1.5 (grounds for attorney discipline include conduct in violation of the New York State Code of Professional Responsibility as adopted from time to time by the Appellate Divisions of the State of New York).

Although the law of the Second Circuit disfavors disqualification of counsel (see Guerilla Girls, Inc. v Kaz, 2004 U.S. Dist LEXIS 19969 (S.D.N.Y. 2004) by a learned Judge of this court), the McCarter Firm has an irreconcilable conflict because Howard Berkower, Esq. ("Berkower"), a partner in the McCarter Firm, previously represented VV in a number of legal matters over a two year period immediately overlapping the commencement of this lawsuit, and received virtually all of VV's confidential information, much of which is the subject of this lawsuit. Thus, the McCarter Firm must be disqualified because the firm cannot thereafter represent CADA in this matter in which CADA's interests are materially adverse to the interests of VV, the former client.

The McCarter Firm neither sought nor received VV's consent to a waiver of this conflict.

VV has requested that the McCarter Firm withdraw from this litigation and they have refused.

STATEMENT OF FACTS

Mr. Berkower in his then capacity as a partner in Zuckerman, Gore and Brandeis was initially retained by VV for almost a year, commencing in February, 2006. He was again retained in March 2007 and performed legal services for VV until October 2007.

During the first engagement, Mr. Berkower prepared the Private Placement Memorandum and supporting documents to be used in VV's capital formation effort, the very fund-raising effort that is the subject of the securities fraud count of the instant Amended Complaint, the only Federal subject matter count of the Plaintiff's Complaint. Further, he worked closely with VV's CEO, Malcolm Bricklin, VV's Financial Controller, Marybeth Higgins, and Atlantic Pacific Capital, an investment banking firm retained by VV to assist it in this fundraising effort. It was Atlantic Pacific Capital that introduced and recommended VV retain Mr. Berkower.

In his role as legal counsel to VV, Mr. Berkower was privy to all of VV's fundraising, investor and financial information, including the funds invested by Plaintiff, as well as confidential business and product development plans.

In Mr. Berkower's second engagement, he worked closely with both VV and with the senior management of Visionary Vehicles, Inc. (hereinafter referred to as the "Inc"), a separate corporation that was acquiring many of the assets of VV. He coordinated with outside consultants, and was responsible for preparing all of the documentation supporting Inc's formation and the transfer of certain assets of VV to Inc, and the assumption of certain VV liabilities by Inc. It is these assets, in part, that the Plaintiff, through the McCarter Firm, would have to try to reach in the unlikely event

they obtain a judgment herein. In this capacity Mr. Berkower was again made aware of all of the confidential financial information of VV and many other privileged matters.

Thus, in his role as legal counsel, and based upon the attorney-client privilege, for over two years in part concurrent with the filing of this lawsuit, Mr. Berkower was intimately privy to all of VV's confidential financial and business information.

In December, 2007, Mr. Berkower left the firm of Zuckerman Gore and Brandeis to join the McCarter Firm, the attorneys for the parties adverse to VV in this matter.

ARGUMENT

I. The McCarter Firm Should be Disqualified due to an Irreconcilable Conflict of Interest

In light of the prior representation of VV by a partner of the firm, the McCarter Firm's representation of plaintiff violates Canons 4, 5, and 9 of the Code. These Canons, and the Disciplinary Rules enacted thereunder, operate in conjunction to disqualify a law firm from representing a party to a litigation where, as here, one of the firm's partners or associates previously represented an adverse party in substantially related matters. Furthermore, disqualification cannot be avoided through the use of screening mechanisms if, as will be the case here, the tainted attorney will continue to work in proximity with the attorneys handling the litigation, and thus there is a discernable risk that screening measures may not be 100% effective.

A district court is responsible for supervising the members of its bar. In performing this task, district courts within the Second Circuit consult the guidelines for professional conduct set forth in

the Code. See e.g., Bennett Silvershein Assoc. v. Furman, 776 F. Supp. 800, 803 (S.D.N.Y. 1991) (Mukasey, J.) ("This Circuit has reviewed attorney disqualification motions under Canon 4 of the Model Code of Professional Responsibility."). The Code contains Canons, Ethical Considerations, and Disciplinary Rules. The Canons are statements that generally express the standards of conduct expected of attorneys in their interactions with the public and involvement with the legal system. The Ethical Considerations represent the aspirations toward which all lawyers should strive. Finally, the Disciplinary Rules are pronouncements of the minimum level of conduct below which no attorney can practice without becoming subject to disciplinary action. See Code of Professional Responsibility, Preliminary Statement (29 McKinney 1992).

Ethical Canons 4 and 5 address the protection of client confidences. Canon 4 provides that "A lawyer should preserve the confidences and secrets of a client." Canon 5 provides that "A lawyer should exercise independent professional judgment on behalf of a client." A corresponding Disciplinary Rule DR 5-108(A)(1) [22 NYCRR § 1200.27(A)(1)] provides, in pertinent part:

> A. Except ...with respect to ...government lawyers, a lawyer who has represented a client in a matter shall not, without the consent of the former client after full disclosure:
>
> 1. Thereafter represent another person in the same or a substantially related matter in which that person's interests are materially adverse to the interests of the former client.

Generally, the rule against successive representation "concerns itself with the unfair advantage that a lawyer can take of his former client in using adversely to that client information communicated in confidence in the course of the representation," including "knowing what to ask for in discovery, which witnesses to seek to depose, what questions to ask them, what lines of attack

to abandon and what lines to pursue, what settlements to accept and what offers to reject." Ulrich v. Hearst Corp., 809 F. Supp. 229, 236 (S.D.N.Y. 1992) (Leval, J.).

Representation of a client who is adverse to a former client may also violate Canon 9, which admonishes lawyers to avoid even the appearance of impropriety. Cheng v. GAF Corp., 631 F.2d 1052, 1055-1056, 1059 (2d Cir. 1980), vacated on other grounds, 450 U.S. 903, 101 S. Ct. 1338 (1981); Marshall v. New York State Div. of Police, 952 F. Supp. 103, 112 (N.D.N.Y. 1997) (in addition to conflict of interest, facts also establish unacceptable appearance of impropriety under Canon 9).

The prohibition on representing a client adverse to the interests of a former client extends to the tainted attorney's entire law firm. DR 5-105(D) provides, in relevant part:

> While lawyers are associated in a law firm, none of them shall knowingly accept or continue employment when any one of them practicing alone would be prohibited from doing so under ... DR 5-108(A) ... except as otherwise provided therein. N.Y. Jud. Law § DR 5-105(D) (McKinney 1992).

Significantly, the Rule makes no allowance for avoiding disqualification through the use of screening measures. New York's rules are, in this regard, consistent with those of most other states, which similarly do not recognize screening as a cure for ethical objections when a lawyer moves from one firm to another. See Lee A. Pizzimenti, Screen Virite: Do Rules About Ethical Screens Reflect the Truth About Real-Life Law Firm Practice, 52 U. Miami L. Rev. 305, n.30 (1997) (stating that only four states have promulgated rules allowing for screening).

Courts in this Circuit have frequently disqualified both the attorney with the conflict and the law firm at which that attorney works, upon finding a violation of Canons 4, 5 and/or 9. See NCK

Organization, Ltd. v. Bregman, 542 F.2d 128, 129 (2d Cir. 1976) (affirming disqualification of counsel for ethical violations under Canons 4 and 9); In re Manshul Constr. Corp., No. 97 Civ. 4295, 1998 WL 405039, at 6 (S.D.N.Y. July 20, 1998) (Batts, J.) (disqualification warranted under Canon 9 based on possibility that attorney, in her new representation against former client, may improperly use confidences gained in her representation of former client to his detriment); Rosman v. Shapiro, 653 F. Supp. 1441, 1446 (S.D.N.Y. 1987) (Sprizzo, J.) (disqualification of attorney based on "appearance of impropriety is so great, the Court in the exercise of its supervisory powers cannot allow the situation to go uncorrected"); see also Solow v. W.R. Grace & Co., 83 N.Y.2d 303, 309, 610 N.Y.S.2d 128, 131 (1994) (considering disqualification of attorney for violation of Code of Professional Responsibility DR 4-101, DR 5-108 and Canon 9); Alicea v. AngelinaBencivenga, 270 A.D.2d 125, 704 N.Y.S.2d 578 (1st Dep't 2000) (relying on New York Code of Professional Responsibility DR 5-108(A) to disqualify counsel); In the Matter of Walden Federal Sav. & Loan Assoc., 212 A.D.2d 718, 719, 622 N.Y.S.2d 796, 797 (2d Dep't 1995).

In sum, consistent with the Code, State and Federal Courts in New York have routinely used disqualification as a way to insure that a party is not subjected to any unfair disadvantage when one of its former lawyers joins a firm representing an adversary.

II. The McCarter Firm Should be Disqualified due to a Conflict of Interest

A. VV Is a Prior Client of Howard Berkower, An Attorney Who Has Been Subsequently Hired by the McCarter Firm.

One of the partners of the McCarter Firm, Howard Berkower, was initially retained by VV for almost a year commencing in February, 2006. He was again retained in March 2007 and performed legal services for VV and Inc until October 2007. Although at first he was a member of the Zuckerman Gore and Brandeis firm, he joined the McCarter Firm in December 2007, approximately ten months after this lawsuit started. This lawsuit overlapped his representation of VV by eight months. Both he and other members of the Brandeis firm actively represented VV and consulted with virtually all of VV's senior executives on a regular basis. During the first engagement, Berkower prepared the Private Placement Memorandum and supporting documents to be used in VV's capital formation effort. Berkower assisted VV in drafting financial agreements, and also acted as litigation counsel and reviewed the status of litigations conducted out of state by other counsel.

VV officials had privileged discussions regarding all their legal matters with Berkower. VV officials discussed finances, strategy, competition, employment matters, and virtually everything related to VV's business with Berkower in a confidential manner that they believed was protected by the attorney-client privilege. Further, Berkower drafted the Private Placement memorandum which was the basis for the fundraising about which the Plaintiff complains in their Securities Fraud count of the instant Complaint.

During his engagement, Berkower created the documentation supporting VV's transfer of certain assets to Inc, together with the assumption of certain VV liabilities by Inc and was involved in numerous matters at issue in this case. Berkower even drafted the Private Placement Memorandum which VV used in its capital formation effort. Throughout the course of two years representing VV and Inc, Berkower was privy to all privileged discussions with VV's senior management about exactly the same matters which are at issue in this litigation - the confidential business and product development plans of VV.

Clearly Berkower, and through him the McCarter Firm, have intimate knowledge of the important confidential information regarding VV's tactics and strategy in connection with the transfer of the assets, confidential business and product development plans, and of VV's possible approach to settlement of such conflicts, gained through privileged communications between Berkower, VV and Inc. VV has the right "to be free from any apprehension that privileged matters disclosed to an attorney will subsequently be used against it in related litigation. It is not necessary for a party seeking disqualification to show that confidential information necessarily will be disclosed in the course of the litigation; rather, a reasonable probability of disclosure should suffice." Jamaica Public Service Co. v. AIU Insurance Co., 92 N.Y.2d 631 at 637 (Ct. App., 1998).

B. McCarter Firm's Representation *of Plaintiffs Violates Canons 4, 5, and 9.*

McCarter Firm's representation of plaintiff falls squarely within the prohibitions of Canons 4, 5 and 9. The Canons are intended to prevent specifically the scenario that exists in this case: a party to a litigation facing the possibility of its defense being compromised by an opposing counsel

who was privy to privileged and confidential information learned in the course of a prior attorney-client relationship.

Consistent with DR 4-101(B), the courts in this Circuit have applied the following three-part test to determine whether representation of a client that is adverse to a former client violates Canon 4:

(1) The moving party is a former client of the adverse party's counsel;

(2) There is a substantial relationship between the subject matter of the counsel's prior representation of the moving party and the issue in the present lawsuit; and

(3) The attorney whose disqualification is sought had access to, or was likely to have access to, relevant privileged information in the course of his prior representation of the client.

See Evans v. Artek Sys. Corp., 715 F.2d 788, 791 (2d Cir. 1983); Guerilla Girls, Inc. v Kaz, 2004 U.S. Dist LEXIS 19969 (S.D.N.Y. 2004) (Stanton, J.); Loomis v. Consol. Stores, Corp., No. 98 Civ. 8735, 2000 U.S. Dist. LEXIS 12391, at 6 (S.D.N.Y. Aug. 29, 2000) (Sweet, J.); Red Ball Interior Demolition Corp. v. Palmadessa, 908 F. Supp. 1226, 1239 (S.D.N.Y. 1995) (Sweet, J.); United States Football League v. National Football League, 605 F. Supp. 1448, 1452 (S.D.N.Y. 1985) (Leisure, J.). Since there is no question that Berkower represented VV and that he was privy to confidential and privileged communications in the course of that representation, the only question for purposes of determining whether Canon 4 is implicated here is, whether there is a "substantial relationship" between the subject matter of Berkower's prior representation of VV and the issues in the current lawsuit.

The courts are particularly inclined to find the "substantial relationship" test satisfied where, by virtue of the prior relationship, the attorney became privy to confidential information or knowledge which provides a litigation advantage that would not otherwise be available. See Bennett Silvershein Assoc. v. Furman, 776 F. Supp. 800, 804 (S.D.N.Y. 1991) (Mukasey, J.) (matters are substantially related if the attorney gained an advantage from a prior relationship otherwise not available, even if the advantage only concerned background issues).

In Ullrich v. Hearst Corp., 809 F. Supp. 229 (S.D.N.Y. 1992), an attorney was disqualified from representing three former Hearst employees in their employment discrimination claims against the company, based on the court's determination that the attorney's former representation of Hearst afforded him "continuous access" to confidential information that was closely linked to issues that were relevant to the current employment discrimination litigations. Id. at 233. Specifically the court found that, even though the attorney did not handle any claims involving the three plaintiffs, he had extensive experience with Hearst's performance evaluation process, and thus had knowledge of general performance levels of other employees against whom plaintiffs would be measured. The court concluded that this experience presented a "clear likelihood that confidential information imparted to the attorney by the former client will be used against the interests of [the] former client," and thus required disqualification. Id. at 236.

Similarly, in Red Ball Interior Demolition Corp., 908 F. Supp. at 1244, the Court was concerned with preventing the use of insights gained by counsel through his previous representation of an adverse party. In that case, a civil action for breach of fiduciary duty, the attorney (Horwitz)

was disqualified from representing defendant Palmadessa because he had previously represented plaintiff Red Ball in a criminal proceeding. Although the Court recognized that the questions of law and fact were different in the civil action and the criminal proceeding, it found disqualification was proper because the witnesses, testimony, and other evidence relevant to each action were likely to overlap. Furthermore, the Court stated, "even taking [defendant's] contentions that Horowitz gained no knowledge during his past representation of Red Ball as true, the fact that Horowitz had at least some access to such facts and witnesses presents enough of an appearance of a conflict of interest to meet the successive representation test and to warrant disqualification." Id. at 1245. See also Fernandez v. City of New York, No. 99 Civ. 0777, 2000 U.S. Dist. LEXIS 3503, at 3-4 (S.D.N.Y. Mar. 21, 2000) (Chin, J.) (law firm disqualified from representing plaintiff in false arrest and malicious prosecution case because there was a reasonable likelihood that firm's earlier representation of defendant in investigation by Internal Affairs Bureau of off-duty employment by defendant resulted in acquisition of confidential information and could be useful to plaintiff).

These decisions demonstrate that the substantial relationship test is readily satisfied here because, as a senior-level attorney for VV, Berkower, himself and not an associate, became intimately familiar with information that will have a direct bearing on the outcome of the securities fraud claims and corporate waste claims which are being alleged against the defendants in the present case. The Private Placement Memorandum, and Subscription Agreements Berkower drafted were used to solicit and close the Plaintiff's investments; the very investments they claim were fraudulently induced. If this case goes to trial, which it should not because there is no federal

subject matter jurisdiction, Mr. Berkower will have to be a witness regarding his representation of VV in the Private Placement Memorandum. Further, he may be a witness regarding his knowledge of the assets and the allegedly wasteful expenditures of Mr. Bricklin, and how he characterized these matters in the Private Placement Memorandum and other documents he prepared.[1] As discussed more fully above, in the course of over hundreds of hours spent representing VV in the course of two years immediately preceding joining the McCarter Firm, Berkower became fully familiar with virtually all aspects of the operations of VV, including the procedures, trade secrets and attempts to protect them, its litigation practices, its financial situation and its attitude toward settlement, which is certainly material to this litigation.

Moreover, having obtained information in the course of attorney-client privileged communications, Berkower's knowledge includes confidential information that would not otherwise be discoverable, and thus could significantly compromise VV's defense. For example, Berkower would be able to offer plaintiff strategies on how to proceed on the fraud, negligent misrepresentation and misappropriation of funds counts because he participated in drafting all of the detailed business documents and business plans that would otherwise not be subject to discovery.

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[1] In Renner v. Townsend Fin. Servs. Corp., the court found that in determining whether an attorney ought to be disqualified from an action due to his role as a witness, the test the court must apply "is whether the attorney's testimony could be significantly useful to his client. If so, he should be disqualified regardless of whether he will actually be called." Renner v. Chase Manhattan Bank, 2002 U.S. Dist. LEXIS 8898 (S.D.N.Y. 2002), *quoting* Lamborn v. Dittmer, 873 F.2d 522, 531 (2d Cir. 1989). In Renner, the attorney and law firm were disqualified from further representation of the defendants upon the finding that defense counsel's testimony was necessary to lay predicate for civil fraud, which satisfied requirement of prejudice, and therefore passed the strict scrutiny test. Id.

It is our belief, however, that the case for disqualification presented in this motion is so strong that it is not necessary to expand upon the additional attorney-witness argument.

Thus Berkower is in a position where he is privy to confidential information that could serve to challenge credibility of the accusations; to prepare cross-examination; and to otherwise seek to challenge explanations of management determinations that are at issue. In a more general sense, as a senior member of VV's legal team, Berkower has had numerous confidential and privileged communications with several of the principal decision makers within VV, during which he became privy to their strategic thinking on litigation issues such as settlement, discovery, business acquisition and transfer of assets. On the basis of those communications, he can reach informal judgment, in advance, regarding the effectiveness of contemplated strategies and can anticipate VV's reactions to them. This acquired knowledge thus likewise creates the risk of unfair advantage that Canons 4 and 5 were designed to prevent.

To summarize, the similarity and overlap between the issues confronted by Berkower in his prior representation of VV, and those issues that will be, or likely will be, confronted in this lawsuit, satisfy the "substantial relationship" test. Simply put, Berkower possesses information about VV: its employees; its finances; its business plans; its managers; its operations; and its policies, that an adversary has no right to know. Access to this information disqualifies Berkower from representing plaintiffs in this action and, by virtue of DR 5-105(D), disqualifies his law firm as well.

C. Disqualification of the McCarter Firm by Virtue of Berkower's Prior Representation of VV Is Not Avoided by Screening Berkower from the Attorneys Directly Involved in this Litigation

The McCarter Firm's defense of its decision to proceed with the representation of the plaintiff, despite its recruitment of Berkower as a partner prior to this suit being brought, ultimately stems from the McCarter Firm's assertion that any ethical improprieties can be cured by screening measures that were adopted to "screen" Berkower from the information regarding the present lawsuit, by creating what they described as a "Chinese Wall." First, "screening" is never mentioned in the Code as an antidote for an otherwise impermissible representation. The New York Code of Professional Responsibility does not recognize the use of screening devices except in cases involving former government lawyers or judges, see 22 N.Y.C.R.R. § 1200.45(B)(codifying DR 9-101(B)), and recently the ABA House of Delegates voted to reject a proposal to permit screening to avoid disqualification. The absence of any mention of screening in other situations involving impermissible successive representations is telling and itself makes plain the clear position of the Code with respect to this issue. Second, the applicable authorities in this Circuit, as well as the courts of New York, hold that such screening measures will not prevent disqualification, particularly where the facts and circumstances present a discernable risk that the screening will not serve its intended goal of eliminating any risk of ethical violations, the inappropriate use or disclosure of confidential information and/or the appearance of impropriety. Furthermore, it does not protect client confidences from misuse in substantially related and adverse litigation; does not free the former client from any anxiety that matters disclosed to an attorney will subsequently be

used against it in related litigation; and does not provide a clear and readily administered test, which would encourage self-enforcement among members of the legal profession. In Kassis v. Teacher's Ins. and Annuity Assoc., 93 N.Y.2d 611 at 616 (Ct. App., 1999) the Court of Appeals discussed that attempted remedy of screening. In that case, the partner in charge of the litigation at issue assured the Court that (1) the entire file was being kept in his office rather than in the general filing area; (2) his office was a substantial distance from the associate in his firm who was being disqualified; (3) the associate was being instructed not to touch the file or to discuss the matter with any partner, associate, or staff member of the firm; (4) no meetings, conferences, or discussion concerning the matter would take place in the associate's presence; (5) all future associates who may work on the matter would be instructed not to discuss the matter with the associate being disqualified. Nevertheless, the Court of Appeals held that the entire firm was disqualified.

As in the instant case where the presumption of disqualification does arise and attorneys search for a way to rebut it, the Court in Kassis found that the party seeking to avoid disqualification must prove that any information acquired by the disqualified lawyer is unlikely to be significant or material in the litigation. Id. at 519. The information Berkower obtained regarding VV's trade secrets and attempts to protect them, its litigation practices, its financial situation, its attitude toward settlement, and most important the fundraising that is the basis for the alleged Federal jurisdiction in this case, is undeniably significant and material to this litigation.

Similarly, the scholarly authorities on the subject all agree that screening should be rejected where, as here, the tainted attorney had an extensive relationship with the former client. See Lee A.

Pizzimenti, Screen Virite: Do Rules About Ethical Screens Reflect the Truth About Real-Life Law Firm Practice, 52 U. Miami L. Rev. 305, 334 (1997) (stating that screens are particularly inappropriate where the tainted lawyers had a material role in representing their former client); Tom Morgan, Screening the Disqualified Lawyer: The Wrong Solution to the Wrong Problem, 10 U. Ark. (Little Rock) L.J. 37, 52-53 (1987) (concluding that screening was appropriate only if the tainted lawyer realistically did not receive significant confidential client information (an approach which was utilized by the Second Circuit in Silver Chrysler Plymouth, Inc. v. Chrysler Motors Corp., 518 F.2d 751 (2d Cir. 1975)).

It is not even necessary to show decisively that confidences have been obtained: the inference is sufficient. In the previously mentioned case of Walden Federal Savings and Loan Ass'n v. Village of Walden, 622 N.Y.S.2d 796 at 797 (2d Dep't, 1995), where the law firm, some of whose members drafted a Village's building code provisions, sought to represent a party challenging those provisions, the Second Department disqualified the entire firm holding that "when ... it is reasonable to infer that the firm gained some confidential information during its former representation of the former client which is of value to its present client, disqualification is justified on the basis of the mere appearance of impropriety." Id.

In Cheng v. GAF Corp., 631 F.2d 1052, 1058 (2d Cir. 1980), the Second Circuit recognized that, "[i]f after considering all of the precautions taken by the firm whose disqualification is sought this Court still harbors doubts as to the sufficiency of these preventive measures, then we can hardly expect [the former client] or members of the public to consider the attempted quarantine to

be impenetrable." Id at 1058 (2d Cir. 1980), vacated on other grounds, 450 U.S. 903, 101 S. Ct. 1338 (1981). Based on this reasoning, the Cheng Court ruled that disqualification was necessary to "guard against the inadvertent use of confidential information" notwithstanding the fact that: (1) a screen had been implemented preventing the tainted attorney from any involvement in litigation against that attorney's previous client; (2) the tainted attorney worked in a department separate from the one in which the case at issue was being handled; and (3) the firm had submitted affidavits attesting that the tainted attorney had not worked on the matter and that he had not disclosed any confidential information or discussed the merits of the action with colleagues. Id. at 1057.

New York State authorities are particularly relevant since this disqualification motion ultimately turns on an evaluation of the Code. See Pastor v. Trans World Airlines, Inc., 951 F. Supp. 27, 30 (S.D.N.Y. 1996) (Glasser, J.); Decora Inc. v. DW Wallcovering, Inc., 899 F. Supp. 132, 136 n. 4, 140 n. 9-10 (S.D.N.Y. 1995)(Koeltl, J.). Furthermore, plaintiffs are proceeding with claims under the New York State law in addition to Rule 10B-5 of The Securities and Exchange Act of 1934, which, in the absence of 10B-5 claim, would be adjudicated in the New York State courts. In those courts, screening measures have consistently been met with skepticism and disapproval. See, e.g. Solow v. W.R Grace & Co., 83 N.Y.2d 303, 313, 610 N.Y.S.2d 128, 135 (1994) ("If an attorney has represented a client in an earlier matter and then attempts to represent another in a substantially related matter which is adverse to the interests of the former client, the presumption of disqualification is irrebuttable."); Trustco Bank New York v. Melino, 164 Misc. 2d

999, 1004-1006, 625 N.Y.S.2d 803, 807-808 (N.Y. Sup. Ct. Albany County 1995) ("the impermeability of a Chinese Wall [is not] an attainable concept").

In cases where there is a weak connection between the prior representation and the current case, some Courts have explored the viability of screening. Although the connection here is particularly strong, we will still review the other factor those Courts consider, the size of the firm. Since it is particularly important that the Code of Professional Responsibility not be mechanically applied, the courts view size in terms of the number of attorneys working at one location, as opposed to the number of employees in the entire firm. In re Del- Val, 158 F.R.D. 270, the presumption of shared confidences was rebutted only upon the showing that in a firm of 400 attorneys, 300 worked in the New York office where the tainted attorney worked, thus reducing the possibility of inadvertent disclosure. Charles Lee, the principal counsel for the Plaintiff from the McCarter Firm, is assigned to the Stamford, Connecticut office of the firm. However, on numerous occasions, members of the undersigned's firm have had conversations with Mr. Lee and his associates when they were working on this case out of the McCarter Firm's New York office where Mr. Berkower is assigned. The McCarter Firm, despite the fact that its total number of attorneys is around 400, has only 16 lawyers in its Stamford office and only 29 attorneys are located in the New York office (33 miles from Stamford). Consequently, in determining whether the screening measures are adequate in the context of the relevant number of the attorneys, the court should consider cases with discussion of firms of a smaller size. For example, in Decora v. DW Wallcovering, Inc., 899 F. Supp. 132, 140 (S.D.N.Y. 1995) (Koeltl, J.) the District Court

disqualified counsel for defendants despite the firm's implementation of screening measures designed to isolate the tainted associate -- who had previously represented plaintiff in another action while with a different law firm -- from all communications relating to the case. The court reasoned that the relatively small size of the firm -- forty-four attorneys in total -- and the associate's close working relationship with other attorneys in the department, created an unreasonable risk of disclosure. Id. at 140-141.

Numerous other federal and state courts in New York similarly have been persuaded that disqualification was warranted because of the relatively small size of the unit in question. Kassis v. Teacher's Ins. & Annuity Assoc., 93 N.Y.2d 611, 618, 695 N.Y.S.2d 515, 519 (1999) (26 attorney law firm disqualified despite the implementation of screening measures); Adams v. Lehrer McGovern Bovis, Inc., 208 A.D.2d 377, 617 N.Y.S.2d 9 (1st Dep't 1994) ("Regardless of the best efforts of the attorneys involved, the erection of an adequate internal barrier to prevent the possibility that confidential information concerning defendant could inadvertently flow from defendant's former counsel to the other attorneys at her new firm during the litigation of this ongoing matter is simply not possible, in light of the small size of the new firm, which employs only four attorneys."); see also Steel v. Gen. Motors Corp., 912 F. Supp. 724, 744 (D.N.J. 1995) ("Often a law firm will attempt to use screening measures to obviate a conflict of interest. This is not appropriate in this case. First, the smaller the firm, the less likely such screening measures will be effective. In several cases, courts have disapproved of screening measures," aff'd, sub. nom., Cardona v. GMC, 942 F. Supp. 968 (D.N.J. 1996).

Here as well, and for similar reasons, screening measures must be rejected as a means to avoid disqualification because they do not, and cannot, provide adequate assurances that conflict-of-interest concerns will be avoided. Given the size of the McCarter's firm New York office, even if combined with its Stamford office, as well as Berkower's experience and credentials, and the close proximity of the lawyers working on the CADA case, there is every reason to believe that Berkower's contact with McCarter's lawyers working on the CADA case has extended, and will extend, beyond the matters of which we have knowledge. In sum, there is simply no way to remove the risk that Berkower will come into contact with one or more of the attorneys assigned to this litigation and the associated risk of disclosure, inadvertent or otherwise, of VV client confidences; particularly when preparing for Berkowers anticipated deposition. Under these circumstances, it is patently unfair for VV to bear this enduring risk throughout the pendency of what may very well be a lengthy litigation.

See Tom Morgan, Screening the Disqualified Lawyer: The Wrong Solution to the Wrong Problem, 10 U. Ark. (Little Rock) L.J. 37, 54 (1987) ("The problem with [screening] ... is simply that a client can often never know for sure when or whether his confidence has been abused. That the trustworthy must suffer for the sins of the rest is unfortunate, but client confidence must be the key."); Monroe Freedman, The Ethical Illusion of Screening, Legal Times, Nov. 20, 1995 ("The traditional conflict-of-interest rules on switching sides were designed to protect the former clients' confidences, even at the expense of reducing lawyers' employment [sic] mobility. The evasion of these rules through screening jeopardizes client confidences in order to increase lawyers' job

opportunities. This, of course, makes a mockery of the claim that the law is a profession and not a business.... We can only hope that screening is an idea whose time has come to nothing.").

The text of the Code, the policy interests underlying the ethical rules pertaining to client confidences and the appearance of impropriety, and the underlying equities, all compel the conclusion that, rather than causing VV to endure the risk that screening measures will not be 100% effective, responsibility should be placed with those who created the conflict situation in the first place. As discussed above, this conflict did not arise inadvertently, or after the fact. The McCarter firm had the opportunity to withdraw from this representation. They chose not to do it. Furthermore, the disqualification is unlikely to materially prejudice plaintiffs since the litigation is at the pleading stage and no discovery has been propounded or responded to. See, e.g., Field-D'Arpino v. Restaurant Assoc., Inc., 39 F. Supp. 2d 412, 415 n.3 (S.D.N.Y. 1999) (Pauley, J.) (finding "that the disruption and delay attendant to displacing an attorney of record is mitigated here because discovery has not begun"); United States v. Uzzi, 549 F. Supp. 979, 984 (S.D.N.Y. 1982) (Sand, J.) (observing that "neither the defendant nor challenged counsel have a considerable investment in the retention in this proceeding"); Decora v. DW Wallcovering, Inc., 899 F. Supp. 132, 141-1422 (S.D.N.Y. 1995) (Koeltl, J.) (reasoning that because plaintiff moved for disqualification at the outset of the litigation, defendants did not lose the benefit of longtime counsel's specialized knowledge of its operations and did not incur an unduly burdensome loss of time and money in being compelled to retain new counsel (citing Gov't. of India v. Cook Indus., Inc., 569 F.2d 737, 739 n.11 (2d Cir. 1978)).

Therefore disqualification should be ordered as the small potential of harm to the Plaintiff is clearly outweighed by the actual and apparent harm posed to the defendants through the very real violation of the policies underlying the code.

CONCLUSION

For the foregoing compelling reasons, VV's motion to disqualify McCarter & English LLP should be granted.

Dated: July 25, 2008
Boca Raton, Florida

Respectfully submitted,

s/ Jan Michael Morris

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CADA, LLC v. Visionary Vehicles, LLP
Case No. 07 Civ. 4113 (LLS)
Motion to Disqualify McCarter & English, LLP

CERTIFICATE OF SERVICE

I certify that on July 25, 2008, a true and correct copy of the foregoing Motion to Disqualify McCarter & English, LLP was electronically filed and served by Facsimile on all counsel or parties of record on the service list.

s/ Jan Michael Morris

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